(3)

Supreme Court, U.S.
FILED
JUL 19 1999
OFFICE OF THE CLERK

No. 98-1803

IN THE
Supreme Court of the United States

OCTOBER TERM, 1999

RONNIE L. GIBSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY FOR THE PETITIONER

GREGORY A. CASTANIAS
(*Counsel Of Record*)
JACK W. CAMPBELL IV
JONES, DAY, REAVIS & POGUE
51 Louisiana Ave., N.W.
Washington, D.C. 20001
(202) 879-3939

ROBERT L. COOPER
COOPER, DAVIS & COOPER
1719 Ramsey Street
P.O. Drawer 1598
Fayetteville, N.C. 28302
(910) 483-3843

Counsel for Petitioner
Ronnie L. Gibson

10PP

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

ARGUMENT 1

CONCLUSION 7

TABLE OF AUTHORITIES

Page

Cases

American Tobacco Co. v. Patterson, 456 U.S. 63 (1982) 4
Hercules, Inc. v. United States, 516 U.S. 417 (1996) 4
Peguero v. United States, 119 S. Ct. 961 (1999) 2
United States v. Buchanan, 59 F.3d 914 (9th Cir. 1995) 1, 2
United States v. Cordero, 42 F.3d 697 (1st Cir. 1994) 6
United States v. Howle, 166 F.3d 1166 (11th Cir. 1999) 3
United States v. Johnson, 992 F. Supp. 437 (D.D.C. 1997) 3, 5
United States v. Melancon, 972 F.2d 566 (5th Cir. 1992) 3
United States v. Michelsen, 141 F.3d 867 (8th Cir.), *cert. denied*, 119 S. Ct. 363 (1998) 1
United States v. One Male Juvenile, No. 96-4023, 1997 WL 381955 (4th Cir. July 11, 1997), *cert. denied*, 118 S. Ct. 1191 (1998) 1
United States v. Perez, __ F. Supp. 2d ___, No. 98-10389, 1999 WL 239097 (D. Mass. Apr. 8, 1999) 3, 5
United States v. Raynor, 989 F. Supp. 43 (D.D.C. 1997) 3, 5
United States v. Taylor, 139 F.3d 924 (D.C. Cir. 1998) 6
United States v. Woolley, 123 F.3d 627 (7th Cir. 1997) 1
Worcester v. Commissioner, 370 F.2d 713 (1st Cir. 1966) 6

TABLE OF AUTHORITIES (cont'd)

Page

Statute

18 U.S.C. § 3742(c) 4

Miscellaneous Authority

Robert K. Calhoun, *Waiver of the Right to Appeal*, 23 Hastings Const. L.Q. 127 (1995) 5

David E. Carney, Note, *Waiver of the Right to Appeal Sentencing in Plea Agreements with the Federal Government*, 40 Wm. & Mary L. Rev. 1019 (1999) 5

Recent Case, *Criminal Law—Plea Agreements—Second Circuit Upholds Plea Provision That Waives Appeal Without Fixed Sentencing Range—* United States v. Rosa, 123 F.3d 94 (2d Cir. 1997), 111 Harv. L. Rev. 1116 (1998) 5

United States Department of Justice, *Criminal Resource Manual* 4

REPLY FOR THE PETITIONER

1. In his petition, petitioner demonstrated (1) that the courts of appeals are hopelessly divided on whether, and under what circumstances, a sentencing judge's statement that a defendant may appeal his sentence trumps a contrary provision in a plea agreement (Pet. 8-13); and (2) that this is an important and recurring question of federal constitutional and statutory law meriting this Court's review. (Pet. 7, 13-25) The government does not, and cannot, seriously dispute either of these points. Nor does the government deny that this case presents an appropriate vehicle for deciding the issue. Instead, the government devotes virtually all of its opposition to merits arguments that petitioner's sentencing-appeal waiver was knowing and voluntary (Opp. 7-10) and that the Fourth Circuit's decision can somehow be harmonized with the conflicting approaches taken by other courts of appeals. (Opp. 12-15) Petitioner, of course, agrees that this Court should address the merits of this issue. The government's merits-focused brief only underscores this need.

2. Notwithstanding the government's prolix attempt to distinguish factually the Fourth Circuit's decision from the conflicting decisions of the courts of appeals (Opp. 12-15), both the Court of Appeals below and other courts of appeals have explicitly and straightforwardly acknowledged the split in authority. Pet App. 6a ("[W]e disagree with the Ninth Circuit" in *United States v. Buchanan*, 59 F.3d 914 (9th Cir. 1995), "that a waiver of a right to appeal contained in a plea agreement . . . may be held unenforceable because of subsequent erroneous and apparently inadvertent statements by the district court to the effect that the defendant has a right to appeal." (quoting *United States v. One Male Juvenile*, No. 96-4023, 1997 WL 381955 (4th Cir. July 11, 1997), *cert. denied*, 118 S. Ct. 1191 (1998)); *United States v. Michelsen*, 141 F.3d 867, 872 (8th Cir.) (expressly rejecting the Ninth Circuit's decision in *Buchanan*), *cert. denied*, 119 S. Ct. 363 (1998). *See generally United States v. Woolley*, 123 F.3d 627, 632 (7th Cir. 1997) ("Even though some circuits have held that, when

accepting a plea agreement which includes a sentence appeal waiver, the trial judge must conduct a specific colloquy with the defendant addressing the waiver, the law of this Circuit is clear that the court is not required to conduct a specific dialogue with the defendant concerning the waiver . . . ."). The government's attempt to harmonize the obviously conflicting reasoning and results in these cases only highlights the need for this Court to grant certiorari and bring uniformity to the treatment of sentencing-appeal waivers.

Nowhere, however, does the government's opposition address the fundamental legal principle at issue: Which should a defendant rely upon? A sentencing-appeal waiver contained in a plea agreement and drafted by a prosecutor, or the oral explanation delivered by a district judge (who is charged by statute with ensuring the defendant's understanding of the waiver)? The Ninth Circuit's clear and simple answer — which conflicts with the answer given by the Fourth Circuit here — is the correct one: "Litigants need to be able to trust the oral pronouncements of district court judges." *Buchanan*, 59 F.3d at 918.[1]

3. Petitioner demonstrated (Pet. 14-18) that sentencing-appeal waivers should not be enforceable in any circumstance because such waivers can never, as a matter of law, be knowing. The government offers two related responses, neither one convincing. First, it suggests (Opp. 7) that since a defendant may waive constitutional rights as part of a plea agreement, the statutory right to appeal a sentence must also be

---

[1] The government mischaracterizes petitioner's reliance on *Peguero v. United States*, 119 S. Ct. 961 (1999). Petitioner does not contend that *Peguero*'s specific holding governs the issue at hand. (Opp. 12 n.1) Rather, *Peguero*'s discussion of the critical role played by trial judges in ensuring that a defendant understands his appeal rights (119 S. Ct. at 964) reinforces petitioner's argument (Pet. 19 & n.1) that a defendant must be entitled to rely upon a trial judge's statements regarding appealability.

waivable. Second, even though the government admits that, at the time a defendant signs a plea agreement containing a sentencing-appeal waiver, he cannot "know the exact contours of his prospective sentence" (Opp. 8), the government inexplicably concludes (Opp. 9) that the defendant nonetheless understands "the sentencing risks he assumed and the rights he waived." Petitioner anticipated and refuted each of these arguments in his petition (Pet. 14-18), as has every court or judge that has undertaken a detailed analysis of the validity of sentencing-appeal waivers. *See United States v. Melancon*, 972 F.2d 566, 571-72 (Parker, J., concurring specially); *United States v. Perez*, ___ F. Supp. 2d ___, No. 98-10389, 1999 WL 239097 at *7 (D. Mass. Apr. 8, 1999); *United States v. Johnson*, 992 F. Supp. 437, 438-39 (D.D.C. 1997); *United States v. Raynor*, 989 F. Supp. 43, 44 (D.D.C. 1997). *See also United States v. Howle*, 166 F.3d 1166, 1169 (11th Cir. 1999) (Propst, J., concurring specially) ("As a trial judge, I have a problem with obtaining a knowing and understanding waiver of appeal with respect to any potential error I might make at sentencing.").

4. The government's opposition also ignores the devastating effect that sentencing-appeal waivers can have on the Sentencing Reform Act's central purpose of reducing sentencing disparity among similarly situated defendants. (*See* Pet. 21-25) It dismisses this possibility (Opp. 15) as resting on the "flawed premise that district courts will routinely and lawlessly disregard the Sentencing Guidelines." Petitioner offers three responses.

First, robust appellate oversight is critical to minimize inter- and intra-court variations in Guidelines interpretation and application — variations that can occur despite district courts' best efforts to the contrary. (Pet. 23) This is hardly a "flawed premise" — indeed, *the government itself* acknowledges that sentencing-appeal waivers "could encourage a lawless district court to impose sanctions in violation of the guidelines."

United States Department of Justice, *Criminal Resource Manual* § 626.

Second, the empirical evidence shows (*see* Pet. 23 n.12) that over 15% of sentencing decisions issued by district courts are reversed in whole or in part. The courts of appeals serve a demonstrably critical oversight function that would be threatened by widespread use of sentencing-appeal waivers.

Third, Congress plainly did not deem a presumption of faithful discharge to be an adequate means of ensuring uniform interpretation and application of the Guidelines. Instead, Congress provided both defendants and the government a right to appeal sentences, a right described as "essential" and "crucial" to the success of the Guidelines regime. (Pet. 21) Congress was not insensitive to the increase in appellate workload that a uniformity-preserving right of appeal would cause. Rather, it struck a balance between these competing concerns, specifically allowing the government to require that a defendant waive *some* grounds for appeal in exchange for a sentence-certain plea agreement. Pet. 16-17, discussing 18 U.S.C. § 3742(c).[2] Federal courts should not upset this statutory balance by sanctioning broad sentencing-appeal waivers that are not part of a sentence-certain plea agreement. *See American Tobacco Co. v. Patterson*, 456 U.S. 63, 77 (1982) ("[The statute] represents the balance that Congress struck between the two policies, and it is not this Court's function to upset that balance."). Nor should the courts tolerate plea agreements like petitioner's, for their enforcement renders section 3742(c) superfluous. *See, e.g., Hercules, Inc. v. United States*, 516 U.S. 417, 428-29 (1996) ("[s]tatutes, set out in meticulous detail and each supported by a panoply of implementing regulations," cabined government contracting

---

[2] Section 3742(c) preserves both the defendant's and the government's rights to appeal sentences imposed "in violation of law" or "as a result of an incorrect application of the sentencing guidelines."

officers' authority to offer indemnity agreements and would be "render[ed] . . . superfluous" if courts nonetheless recognized implied indemnity agreements).

5. The government closes with the astonishing contention (Opp. 16) that petitioner "cites no decision holding sentencing appeal waivers invalid on policy grounds." To the contrary, petitioner cited and discussed (Pet. 15) two decisions by the United States District Court for the District of Columbia declaring sentencing-appeal waivers invalid on due process and policy grounds. *See United States v. Johnson*, 992 F. Supp. 437 (D.D.C. 1997); *United States v. Raynor*, 989 F. Supp. 43 (D.D.C. 1997). And, after the petition was filed, the United States District Court for the District of Massachusetts also declared sentencing-appeal waivers invalid on these grounds. *See United States v. Perez*, ___ F. Supp. 2d ___, No. 98-10389, 1999 WL 239097 (D. Mass. Apr. 8, 1999).[3] The *Johnson*, *Raynor*, and *Perez* decisions, none of which was even cited in the government's opposition, plainly demonstrate that the validity of sentencing-appeal waivers is a tremendously important, and recurring, question of federal constitutional and statutory law that warrants this Court's attention.[4]

---

[3] *Johnson*, *Raynor*, and *Perez* also reflect a growing body of commentary critical of sentencing-appeal waivers on both constitutional and statutory grounds. *See generally* David E. Carney, Note, *Waiver of the Right to Appeal Sentencing in Plea Agreements with the Federal Government*, 40 Wm. & Mary L. Rev. 1019 (1999); Recent Case, *Criminal Law — Plea Agreements — Second Circuit Upholds Plea Provision That Waives Appeal Without Fixed Sentencing Range* — United States v. Rosa, 123 F.3d 94 (2d Cir. 1997), 111 Harv. L. Rev. 1116 (1998); Robert K. Calhoun, *Waiver of the Right to Appeal*, 23 Hastings Const. L.Q. 127 (1995).

[4] *Johnson* and *Raynor* have effectively established a circuit-wide rule barring sentencing-appeal waivers. Indeed, the D.C. Circuit recently cited *Raynor* favorably for the broad proposition that a defendant cannot waive the right to appeal errors of which he is not aware at the time he signs a

The central question presented by this petition — whether, as the government puts it (Opp. 16), "[t]he benefits of allowing defendants and the government to bargain over the scope of appellate rights in a plea agreement outweigh the cost of the occasional inadvertent error that may go uncorrected" — is undoubtedly an important one. But it is one that should be resolved after plenary review by this Court.

---

plea agreement. *See United States v. Taylor*, 139 F.3d 924, 931 (D.C. Cir. 1998). And, although the First Circuit has yet to pass on the validity of sentencing-appeal waivers (*United States v. Cordero*, 42 F.3d 697, 699 & n.4 (1st Cir. 1994)), First Circuit precedent nonetheless suggests that that court would not be likely to view such waivers favorably. *See Worcester v. Commissioner*, 370 F.2d 713, 718 (1st Cir. 1966) (disapproving of appeal waivers generally because they "put a price on an appeal").

CONCLUSION

For the foregoing reasons, as well as those stated in the petition, certiorari should be granted.

Respectfully submitted,

GREGORY A. CASTANIAS
(Counsel Of Record)
JACK W. CAMPBELL IV
JONES, DAY, REAVIS & POGUE
51 Louisiana Ave., N.W.
Washington, D.C. 20001
(202) 879-3939

ROBERT L. COOPER
COOPER, DAVIS & COOPER
1719 Ramsey Street
P.O. Drawer 1598
Fayetteville, N.C. 28302
(910) 483-3843

Counsel for Petitioner
Ronnie L. Gibson

July 19, 1999